American University Law Review

Volume 50 | Issue 3 Article 17

2001

The Legal Limbo of Indefinite Detention: How Low Can You Go?

Lisa Cox

American University Washington College of Law

The Legal Limbo of Indefinite Detention: How Low Can You Go?

COMMENTS

THE LEGAL LIMBO OF INDEFINITE DETENTION: HOW LOW CAN YOU GO?

LISA COX*

* Note & Comment Editor, *American University Law Review*, Volume 51, J.D. Candidate, May 2001, *American University Washington College of Law*. The author would like to thank Laina Wilk and Professor Leti Volpp for comments on earlier drafts of this piece, and Patrick and Ellis for their patience.

"You shall treat the alien who resides with you no differently than the natives among you; have the same love for him as for yourself; for you were once aliens in the land of Egypt."

Lev. 19:33-34

"It overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound."

Shaughnessy v. U.S. ex rel. Mezei, (Jackson, J., dissenting).

INTRODUCTION

The Constitution's guarantee that no person shall be deprived of liberty without due process of law[1] requires that the decision to detain an individual must comply with minimum standards of fairness.[2] This fundamental right applies to all individuals living within the United States regardless of their citizenship status.[3] Unfortunately, however, many legal permanent residents[4] who have been ordered "removed" (formerly referred to as "deported") by the Immigration and Naturalization Service (INS), have been detained without regard for their constitutional rights to due process and fairness.

Currently, the INS holds approximately 1,800 aliens[5] in "administrative" detention[6] without any release or hearing date.[7]

1. *See* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

2. *See* Murray's Lessee v. Holooken Land Improvement Co., 59 U.S. 272, 276-77 (1855) (tracing the origins of the principles contained in the Constitution's articulation of due process).

3. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (acknowledging that all aliens within the United States are protected by the Fourteenth Amendment); *see also* Plyler v. Doe, 457 U.S. 202, 210 (1982) ("[E]ven aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to . . . constitutional protection."); Wong Wing v. United States, 163 U.S. 228, 237-38 (1896) (holding that aliens within the United States are protected by the Fifth and Sixth Amendments, and may not be punished without a criminal trial, even ordered deported after completion of their sentences).

4. The term "legal permanent resident" refers to those "having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws . . . ." Immigration and Nationality Act, 8 U.S.C. § 1101(a)(20) (1994).

5. *See* 8 U.S.C. § 1101(a)(3) (defining alien as "any person not a citizen or national of the United States").

6. Administrative detention refers to detention for reasons other than punishment for criminal behavior, including: lack of valid documents, ensuring the alien's presence at ongoing immigration proceedings, and facilitating removal. *See Locked Away: Immigration Detainees in Jails in the United States*, HUMAN RIGHTS WATCH Vol. 10, No. 1, § III, Legal Standards, Sept. 1998 *available at* http://www.hrw.org/reports98/us-immig/Ins989-05.htm [hereinafter referred to as Human Rights Watch].

These detainees are not serving a criminal sentence or awaiting trial on criminal charges.[8] Nevertheless, they are held indefinitely, the majority in local jails, because: (1) they have been ordered removed, and therefore the INS will not release them in the United States, and (2) neither their countries of origin nor any third country will accept them.[9] Most of these detainees have been imprisoned for years without having been convicted of crimes that warrant such prolonged detention.[10]

U.S. circuit courts are divided on the issues of whether Congress has authorized such indefinite detention and whether such prolonged detention constitutes a violation of due process rights.[11] As a consequence of this divergence of opinions within the federal judiciary, aliens are afforded different and inconsistent levels of due process protection, depending primarily upon the jurisdiction within which they are detained pending deportation.[12]

Part I of this Comment discusses indefinitely detained aliens within the context of the Ninth Circuit's recent decision in *Ma v. Reno*.[13] Part II discusses statutory interpretation with regard to the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA),[14] paying particular attention to those sections that delegate to the INS the authority to deport and detain aliens. Part III addresses the constitutionality of indefinite detention. Part IV addresses whether U.S. indefinite detention policies violate international law. Part V argues that aliens' rights must be

7. *See* HUMAN RIGHTS WATCH, *supra* note 6, § IV, Findings ("About 1,800 INS detainees live daily with no guarantee that they will *ever* be let out of detention").

8. *See id.* (noting that "[u]nlike criminal prisoners, INS detainees have no exact sentence or set date when they can expect to be released from detention.").

9. *See id.* (explaining the plight of "long term unremovables").

10. *See id.* (finding that many INS detainees have remained incarcerated for years after they have completed their criminal sentences). Human Rights Watch interviewed an Afghani man who had been arrested on a drug charge and sentenced to seventy-five days in jail. *See id.* After completing his sentence he was handed over to the INS where he spent another four years in detention and was still incarcerated at the time of Human Rights Watch's report. *See id.*

11. *See infra* Parts II.C, III.B & III.C (examining diverging views among circuit courts).

12. *See* Ma v. Reno, 208 F.3d 815, 825 (9th Cir. 2000), *cert. granted*, 121 S. Ct. 297 (2000) (noting that a statute authorizing indefinite detention raises serious constitutional questions and furthermore appears inconsistent with prior case law). *But see* Zadvydas v. Underdown, 185 F.3d 279, 285 (10th Cir. 1999) (holding that once a resident alien is ordered deported, he no longer possesses any more constitutional rights than an excludable alien who is owed the least protections in the face of sovereign interests).

13. 208 F.3d 815 (9th Cir. 2000).

14. Pub. L. No. 104-208, 110 Stat. 3009-546 (codified at 8 U.S.C. § 1101 (Supp. II 1996)) ("The Administration's deterrence strategy includes strengthening the country's detention and deportation capability.").

represented uniformly, in conformance with both the Constitution and international law. To ensure this, Congress must impose reasonable time limits upon detention, and the Supreme Court must rule that indefinite detention policies aimed at removable aliens are unconstitutional. More than simply unconstitutional, this denial of due process represents a crisis, albeit within the margins of constitutional jurisprudence, as it affects those already at the periphery of American society—aliens. Nevertheless this deprivation is antithetical to both the unifying principles underpinning the U.S. Constitution and the rhetoric inherent in our national psyche—America as a land of freedom, progress, and the rule of law.

I. KIM HO MA'S STORY

Kim Ho Ma's journey from his native land of Cambodia began in 1980, when he was just two years old.[15] As with most refugees, Ma and his family left their home due to civil unrest and political oppression.[16] His family reached America in 1985, and in 1987 Ma became a lawful permanent resident of the United States.[17] In 1996, when Ma was 17, he was convicted of first-degree manslaughter as the result of his involvement in a gang-related shooting.[18] Ma was tried as an adult and sentenced to 38 months in prison, but was released early for good behavior.[19] This was Ma's only criminal conviction.[20] Upon his release from prison, the INS placed Ma into custody and, based upon his conviction as an aggravated felon, instituted deportation proceedings against him.[21]

Despite the fact that Ma had lived the majority of his life as a U.S.

15. *See Ma*, 208 F.3d at 819.

16. *See id.* (noting that Ma's family fled Cambodia in 1979 and subsequently spent five years in refugee camps). "Refugee" has been defined as a person who has fled his or her home country because of a well-founded fear of persecution due to their race, religion, nationality, political opinion or membership in a particular social group. *See* U.N. Convention Relating to the Status of Refugees, July 28, 1951, art. I, 189 U.N.T.S. 150, 152 (entered into force Apr. 22, 1954); *see also* U.N. Protocol Relating to the Status of Refugees, Jan. 31 1967, art. I, U.S.T. 6223, 6225, 606 U.N.T.S. 267.

17. *See Ma*, 208 F.3d at 819.

18. *See id.*

19. *See id.* (noting that Ma was sentenced to thirty-eight months in prison but was released after twenty-six months).

20. *See id.*

21. *See id.* (stating that Ma was found to be both removable as well as ineligible for "withholding of deportation because of his conviction"); *see also* 8 U.S.C. § 1227(a)(2) (Supp. II 1996) (listing other crimes for which the INS is authorized to remove aliens, including crimes of moral turpitude, multiple criminal convictions, high speed flight, crimes involving controlled substances, certain firearms offenses, crimes of domestic violence, stalking and child abuse and other miscellaneous crimes involving espionage, sabotage and treason).

resident alien, IIRIRA allowed the INS to remove Ma and send him back to Cambodia.[22] Cambodia, however, does not have a repatriation agreement with the United States, and therefore refused to allow Ma to return.[23] Thus, the INS held Ma in prison for more than two years after his lawful prison sentence had expired; claiming the power to detain him indefinitely under the guise of IIRIRA.[24] In April 2000, however, the Ninth Circuit ordered Ma's release,[25] finding that the INS lacks authority under existing immigration laws to indefinitely detain those aliens who have entered the United States, yet who cannot be removed to their native lands.[26]

In deciding this case, the Ninth Circuit carefully applied the canon of constitutional avoidance[27] so as to avoid deciding the Ma case on due process grounds.[28] Other circuit courts when faced with similar cases have reached contradictory results.[29] These courts have held that the INS' indefinite detention policy is not unconstitutional, and furthermore that decisions concerning the length of detention should be left ultimately to the discretion of the Attorney General[30]

22. *See* 8 U.S.C. § 1237(a)(2)(iii) (Supp. II 1996) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

23. *See Ma*, 208 F.3d at 819 (explaining that the United States and Cambodia still have yet to reach a repatriation agreement). Other countries with whom the United States has no diplomatic relations, or who simply refuse to admit their citizens who have fled include: Cuba, Iran, Iraq, Laos, Libya, and Vietnam. *See* HUMAN RIGHTS WATCH, *supra* note 6, § IV, Findings.

24. *See Ma*, 208 F.3d at 819 (explaining that although Ma filed two motions for release on bond in 1997, the court denied both requests determining, based upon his one criminal conviction, that Ma posed a danger to the community).

25. *See id.* at 831 ("Under these circumstances, the INS may not detain Ma any longer.").

26. *See id.* at 822 (construing the detention provisions of IIRIRA as giving the Immigration and Naturalization Service (INS) authority to detain aliens only for a reasonable time beyond the statutory removal period).

27. *See id.* (noting a long-standing rule that courts should interpret statutes in such a way that will allow them to avoid deciding significant constitutional questions) (citing DeBartolo Corp. v. Fla. Gulf Coast Bldg., 485 U.S. 568, 575 (1988) and United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916)). This rule often has been used in the immigration context. *See, e.g.*, United States v. Witkovich, 353 U.S. 194, 199 (1957) (holding that a statute requiring aliens to answer truthfully all INS questions implicitly refers to all questions relevant to immigration status). The Court in *Witkovich* read this limitation into the statute in order to avoid the constitutional questions that would arise if the statute was interpreted as requiring aliens to answer all questions posed to them, whether or not they were relevant to INS' purpose of regulating immigration. *See id.* at 199.

28. *See Ma*, 208 F.3d at 827 (noting that the INS' extension of exclusion law to aliens already within the United States raises significant constitutional questions and "we may avoid [answering those questions] by giving the statute a construction that does not require us to undertake any constitutional inquiry").

29. *See infra* note 31.

30. The Attorney General is responsible for administering and enforcing all laws relating to the immigration and naturalization of aliens. *See* 8 U.S.C. § 1103(a) (1999). She has the authority to delegate decision-making power to the Commissioner of the INS, who in turn may delegate power to any other officer or

and the INS rather than to the courts.[31]

II. STATUTORY INTERPRETATION

A. *Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)*

In 1996, Congress passed the IIRIRA, which radically altered the landscape of U.S. immigration law.[32] Pursuant to IIRIRA, these sweeping changes included mandatory detention for certain categories of immigrants and an expansion in the number of crimes for which aliens could be divested of their legal status and be deported.[33] Many of the individuals affected by this law are legal permanent residents who, prior to serving their criminal sentences, lived, worked, and paid taxes in the United States.[34] In addition, many of these individuals have children who are U.S. citizens by birth right.[35]

---

employee of the INS. *See id.*

31. *See* Ho v. Greene, 204 F.3d 1045, 1057 (10th Cir. 2000) (finding the language of 8 U.S.C. § 1231(a)(6) (Supp. II 1996) to mean unambiguously that the absence of an express time limit on the Attorney General's authority to continue to detain beyond ninety days infers that Congress authorized the Attorney General to indefinitely detain certain removable aliens); *see also* Zadvydas v. Underdown, 185 F.3d 279, 297 (5th Cir. 1999) (noting that as long as INS continues to make good faith efforts to deport the resident alien, it can continue to detain him if he is either a danger to the community or poses a flight risk).

32. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified at 8 U.S.C. § 1101 (Supp. II 1996)). IIRIRA made significant changes to the Immigration and Nationality Act (INA) which had previously governed most matters dealing with immigration and aliens. *See generally* Donald Kerwin, *Detention of Newcomers: Constitutional Standards and New Legislation: Part One*, 96-11 Immigr. Briefings 1 (1996) (considering detention issues in depth, placing special emphasis on changes brought about by IIRIRA).

33. *See* HUMAN RIGHTS WATCH, *supra* note 6, § II, Introduction (explaining that before the passage of IIRIRA in 1996, murder, rape, and other serious felonies were the only crimes that could result in deportation). Since the enactment of IIRIRA, any conviction carrying a sentence of one year or longer, as well as some minor drug offenses and shoplifting, requires deportation, whether or not the sentence has been suspended or actually served. *See id.* (citing Immigration and Nationality Act (INA) §§ 212(a), 237(a) and 238(a)); *see also* Sean D. Murphy, *Non-State Entities in International Law, Immigration To and Removal From the United States*, 94 AM. J. INT'L L. 102, 111 (Jan. 2000) (noting that while Congress added considerably to the list of offenses that could result in an alien's removal, it also made it much more difficult to obtain relief from such removal). Congress' new regulations created a situation whereby immigration judges were compelled to deport some aliens, who might otherwise present sympathetic cases, such as those who were fully rehabilitated from their prior criminal acts. *See id.* at 112-13. Murphy also notes that during Fiscal Year 1999, 62,359 aliens were removed as a result of criminal records, including drug convictions (forty-seven percent), criminal violations of immigration law (thirteen percent), and convictions for burglary (five percent) and assault (six percent). *See id.* at 113.

34. *See* HUMAN RIGHTS WATCH, *supra* note 6, § II, Introduction.

35. *See id.*

Essentially, under IIRIRA, if an alien has been convicted of an aggravated felony, upon completion of his prison sentence, he[36] may again be placed into custody by the INS, through an order of the Attorney General.[37] The Attorney General then will determine whether he should be released into society or removed from the United States.[38] Once ordered removed however, it is not always possible to return the alien to his country of birth.[39]

Most indefinitely detained individuals are citizens of countries with which the United States has little or no diplomatic relations or that simply refuse to accept the return of citizens who have emigrated or fled.[40] Other detainees are held indefinitely, because they are "stateless," in that no legal state recognizes the alien's nationality.[41] Still other detainees are held indefinitely, because political upheaval or war has destroyed their home nation's infrastructure, thus eliminating any functioning government.[42] Consequently, often there

36. For ease of reading, this Comment will use a masculine pronoun in referring to aliens; however, both men and women are affected by this policy.

37. *See* 8 U.S.C. § 1231(a)(2) (Supp. II 1996) ("During the removal period, the Attorney General shall detain the alien.").

38. *See id.* § 1227(a)(2)(iii) (stating that an alien who "is convicted of an aggravated felony at any time after admission is deportable").

39. *See* Ma v. Reno, 208 F.3d 815, 819 (9th Cir. 2000), *cert. granted*, 121 S. Ct. 297 (2000) (finding that the Cambodian government would not accept the return of its nationals from the United States due to a lack of a repatriation agreement between the two nations). In designating which country a removable alien should be sent, there are several options the Attorney General may consider. *See generally* 8 U.S.C. § 1231(b) (2000). Removable aliens can designate the country to which they would like to be removed. *See id.* § 1231(b)(2)(A)(i). The Attorney General must honor the alien's request, unless the designated country refuses to accept the alien or does not respond to the request within thirty days. *See id.* § 1231(b)(2)(C)(ii-iii). If the INS is unable to remove the alien to his country of choice, it will attempt to remove him to his country of birth or citizenship. *See id.* § 1231(b)(2)(D). If removal to the alien's country of citizenship is not possible, the INS will attempt to remove him to any other country that will accept him. *See id.* § 1231(b)(2)(E). For additional demographic information on the indefinitely confined, *see* Donald Kerwin, *Throwing Away the Key: Lifers in INS Custody*, 75 Interpreter Releases 649, 650 (1998) (discussing the demographics of the indefinitely confined and analyzing statutory and constitutional standards that protect aliens who are administratively detained).

40. *See* HUMAN RIGHTS WATCH, *supra* note 6, § IV, Findings (noting that Vietnam, Laos, Cambodia, Cuba, Iran, Iraq, and Libya are among the countries that often refuse to accept the return of their citizens).

41. *See id.* (such "stateless" people may include Palestinians, those born in refugee camps, or citizens of governments that no longer exist). International law defines a stateless person as one "who is not considered as a national by any state under the operation of its law." *See* Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, art. 1, 360 U.N.T.S. 117, 136. *See generally* UNITED NATIONS HIGH COMMISSION ON REFUGEES (UNHCR), STATE OF THE WORLD'S REFUGEES, ch. 6 (Oxford 1997); C. Batchelor, *Stateless Persons: Some Gaps in International Protection*, 7 INT'L J. OF REFUGEE L. 232 (1995) (positing that statelessness is an increasing problem of international law and identifying some of the major gaps in the legal protections of stateless persons).

42. *See* HUMAN RIGHTS WATCH, *supra* note 6, § IV, Findings.

is literally no place to remove these so-called "removable" aliens.

Many of these "non-removable" removable aliens are held in detention for extended periods of time without knowing when, if ever, they will be released.[43] According to IIRIRA, if the INS orders an alien removed, the Attorney General has ninety days in which to deport him.[44] The statute also states, however, that an alien ordered removed may be detained beyond the ninety day removal period, but does not specify a maximum length of detention.[45]

B. The Plenary Power Doctrine and Judicial Deference

In analyzing immigration matters and interpreting legislation such as IIRIRA, it is a long-standing common law principle that the judiciary should defer to the legislative and executive branches of government.[46] This principle of full federal authority and judicial deference is generally known as the "plenary power doctrine."[47] Essentially, the doctrine stems from the need for political branches of government to conduct the nation's foreign affairs.[48]

---

43. *See, e.g.*, Kerwin, *supra* note 39, at 651 n.10 (noting that Louisiana's Oakdale facility alone houses aliens from 36 different countries, who have been held in INS administrative detention for over one year).

44. *See* 8 U.S.C. § 1231(a)(1)(A) (2000) ("[E]xcept as otherwise provided . . . when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days.").

45. *See id.* § 1231(a)(6) (stating that an alien ordered removed under section 1227(a)(2) "may be detained beyond the removal period"). Aliens may be detained beyond the removal period if for example the Attorney General has determined they are a risk to the community or unlikely to comply with the order of removal. *See id.*

46. The two leading Supreme Court decisions on this issue, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) and *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953), hold that with respect to immigration matters, the judiciary should defer to the executive as long as the executive is acting within the boundaries set by Congress.

47. *See generally* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 939 (1995) (providing that the plenary power doctrine is rooted in three related principles: (1) immigration policy is the responsibility of the federal government; (2) the primary federal immigration authorities are the legislative and executive branches; and (3) the judiciary has extremely limited, if any, power to review the immigration decisions of the other branches).

48. *See* Weisselberg, *supra* note 47, at 938 (noting that courts have generally viewed the federal government's immigration authority as an inseparable part of their foreign affairs power); *see also* Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (advancing the notion that, because a nation's most important function is to maintain security against foreign aggression and to preserve independence, all other concerns must remain subordinate). The *Ping* court emphasized, in this case, which became known as the "Chinese Exclusion Case," that "[i]t does not matter in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us." *See id. See also* Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (arguing that because the power to exclude aliens is fundamental to a nation's sovereignty (i.e. the necessity of maintaining normal international relations and defending the country against foreign aggression), it should be exercised exclusively by the political

Courts have justified invoking the plenary power doctrine, and deferred to the legislative and executive branches, in cases where they perceive the national security to be an issue[49] or where they feared that a hostile foreign government was attempting to compel the United States to accept its "undesirable" citizens.[50] These policy concerns, however, are unique and applicable only to a small subset of constitutional immigration cases involving aliens that the U.S. government wished to exclude from admission.[51] This distinct group of aliens is otherwise referred to as "excludable" aliens.[52]

---

branches of government). *But see* Carlson v. Landon, 342 U.S. 524, 537 (1952) (explaining that while the power to regulate immigration belongs to the legislative and executive branches of government, the Constitution dictates that this power remain subject to judicial intervention). *See also* Landon v. Plasencia, 459 U.S. 21, 34-35 (1982) (finding that the role of the judiciary is to determine whether an alien's minimum constitutional due process rights have been infringed upon); Fiallo v. Bell, 430 U.S. 787, 793 n.5 (1977) (assessing the Court's immigration case law as reflecting an acceptance of a "limited judicial responsibility under the Constitution" with regard to Congress' power to regulate the admission and exclusion of aliens); Flores v. Meese, 942 F.2d 1352, 1359 (9th Cir. 1991) (concluding that an essential aspect of the right to personal liberty is the "ability to test the legality of any direct restraint that the government seeks to place on that liberty").

49. *See, e.g.*, United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 547 (1950). Knauff was a German citizen who sought admission to the United States in 1948. *Id.* at 539. Though she had recently married an American army veteran of World War II, the Court upheld her exclusion from the United States based on unsubstantiated allegations that she was a spy and thus a threat to national security. *Id.* at 547. The court found Knauff's exclusion without a hearing was permissible because "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 544 (citing Nishimura Ekiu v. United States, 142 U.S. 651, 660, 664 (1892) (upholding the exclusion of an alien without a hearing on the basis that she was likely to become a public charge)).

50. *See, e.g.*, Barrera-Echavarria v. Rison, 44 F.3d 1441, 1448 (9th Cir. 1995) (speculating that judicial decisions requiring excludable aliens to be released into American society, when neither their own country nor any other will admit them, could encourage the same sort of problems the United States experienced with Cuba during negotiations over the Mariel boatlift refugees); *see also* Jean v. Nelson, 727 F.2d 957, 975 (11th Cir. 1984) (expressing the fear that judicial intervention in immigration matters, i.e. securing the release of otherwise excludable aliens, would create the intolerable circumstance in which other nations could purposefully send nationals over to the United States, then refuse to take them back, in effect compelling the United States to grant these aliens physical admission, and thus undermining the integrity of United States borders).

51. *See, e.g.*, *Ekiu*, 142 U.S. at 664 (holding that a Japanese immigrant could be excluded if it was found that he was likely to become a "public charge" under the law); *see also United States ex rel. Knauff*, 338 U.S. at 547 (denying entry to an alien suspected of having spied while working as a civilian for the United States Army in Germany).

52. In immigration law, there was a historical and significant distinction between aliens who have already entered the United States and those who stand at the border or elsewhere seeking to gain admission (otherwise known as excludable aliens). This distinction was acknowledged in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953), where the Court stated that once an alien has "passed through our gates, even illegally, [he] may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." *Id.* The Court reiterated this distinction between physically present aliens and those seeking admission in

Once an alien has been admitted as a lawful permanent resident however, the government's foreign policy and national sovereignty concerns are much less compelling.[53] Issues concerning these aliens, such as indefinite detention policies aimed at protecting the community, are more domestic than international in nature and represent congressional interest in maintaining a safe society.[54] Because cases involving lawfully admitted aliens do not generally invoke international or foreign policy concerns, the need for adherence to the plenary power doctrine and judicial deference in

Landon v. Plasencia, 459 U.S. 21, 32 (1982), when it held that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." *See also* Reno v. Flores, 507 U.S. 292, 306 (1993) (acknowledging that the detention of aliens in deportation [as opposed to exclusion] proceedings must be measured by the Due Process Clause). *See generally* Weisselberg, *supra* note 47, at 937 (explaining that the distinction between excludable and removable aliens is related to the idea that people who have been living in the United States are likely to have established strong ties to the country). Historically, when the INS attempted to deport aliens who had established ties to the United States, courts acknowledged that these aliens were entitled to a different process than those aliens seeking entry from outside the border. *See id.* Consequently, excludable aliens are not afforded the same constitutional due process protections as those aliens who are physically present within the United States. *See id.* As the *Ma* Court observed, "[n]on-citizens who are outside United States territories enjoy very limited protections under the United States Constitution . . . . [In fact,] it is not settled that excludable aliens have any constitutional rights at all." *See* Ma v. Reno, 208 F.3d 815, 824 (9th Cir. 2000), *cert. granted*, 121 S. Ct. 297 (2000).

It is interesting to note that in 1996, the Immigration and Nationality Act's definition of aliens deemed "admitted" to the United States was dramatically amended. *See* 8 U.S.C. § 1101(a)(13)(A) (1999). An alien is no longer deemed "admitted" under the INA unless he entered the country lawfully. "The terms 'admission' and 'admitted' mean, with respect to the lawful entry of the alien to the United States after inspection and authorization by an immigration officer." *See* Illegal Immigration Reform And Immigration Responsibility Act of 1999, Pub. L. No. 104-208, Sec. 301(a), 110 Stat. 3009-575 (1996). Therefore, aliens who enter the United States unlawfully are not physically present under the statute and will not be afforded the same limited constitutional protections as those aliens deemed admitted and physically present.

53. *See Mezei*, 345 U.S. at 215 (indicating that permanent resident aliens, temporarily detained pending removal proceedings, may be released on bond at the discretion of the Attorney General, whose decision is subject to judicial review). The *Mezei* Court compared the detention of aliens in removal proceedings to the detention of excludable aliens and noted that aliens seeking admission to the United States are generally excluded on the basis of foreign policy or national security concerns, and "neither the rational nor the statutory authority for [their] release exists." *Id.* at 216. *See also* Fernandez-Santander v. Thornburgh, 751 F. Supp. 1007, 1009 (D. Me. 1990) (holding that judicial deference to the plenary power of Congress is applicable to Congress' decisions about who is excludable, but not to its decisions regarding treatment of aliens during the deportation process).

54. *See* Ho v. Greene, 204 F.3d 1045, 1062 n.1 (10th Cir. 2000) (Brorby, J., dissenting) (asserting that the reason for detaining aliens, including prevention of flight and protecting the community, are domestic concerns having nothing to do with foreign policy) (citing Phan v. Reno, 56 F. Supp. 2d 1149, 1155 (W.D. Wash. 1999) (holding that the plenary power doctrine has less force over domestic issues than foreign policy matters)).

deciding these cases is significantly diminished.[55]

In addition, the notion of absolute sovereignty has declined with the increasing influence of international norms and human rights standards.[56] International human rights treaties[57] require nation-states to relinquish some measure of sovereignty over foreign individuals within their borders.[58] This relinquishment, in turn, has led to a weakening of the plenary power.[59] Consequently, the notion that every sovereign and independent nation has the inherent and inalienable right "to exclude or to expel . . . any class of aliens absolutely or upon certain conditions, in war or in peace"[60] is no longer necessarily true.

Therefore, because residents of the United States clearly have liberty interests protected by both the Constitution[61] and international law,[62] judicial review of matters such as deportation and detention are not necessarily precluded by the plenary power

55. *See, e.g.*, Yamataya v. Fisher, 189 U.S. 86, 99-101 (1903) (acknowledging the plenary power of the political branches of government with respect to an alien's right to enter the country but rejecting the government's assertion of identical plenary powers with respect to resident aliens).

56. *See* Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 965 (1993) (exploring the plenary power doctrine against the backdrop of internationally changing norms and concluding that the plenary power doctrine has been undermined).

57. *See, e.g.*, The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948). The Universal Declaration is a non-binding, aspirational statement that proclaimed "a common standard of achievement for all nations and all peoples" with respect to life, liberty, property, and equal protection. *Id.* at Preamble. The United Nations General Assembly approved the Universal Declaration by a vote of 48-0. Byelorussia, Czechoslovakia, Poland, Saudi Arabia, South Africa, Soviet Union, Ukraine, and Yugoslavia abstained. *See* Scaperlanda, *supra* note 56, at 1010 n.228.

58. *See* Scaperlanda, *supra* note 56, at 1011 (discussing how the Universal Declaration of Human Rights evidences the agreement by a diverse global community that certain basic rights must be recognized by all). Scaperlanda notes that the Declaration stands for the proposition that while the international community recognizes the sovereignty of independent states, this sovereignty is limited by international human rights principles. *See id.*

59. *See id.* at 1009-11 (discussing the "rights revolution" as a basis for the weakening of the plenary power doctrine).

60. Wong Wing v. United States, 163 U.S. 228, 231 (1896).

61. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 34 (1982) (holding that petitioner was protected by the Due Process Clause because of her status as a resident alien); *see also* Reno v. Flores, 507 U.S. 292, 304 (1993) (finding due process requires that minimum standards be met when the government holds juvenile aliens in custody pending deportation).

62. *See* The International Covenant on Civil and Political Rights, 1966, 999 U.N.T.S. 717 (stating in its preamble, the "foundation of freedom, justice and peace in the world is "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family"). The Covenant goes on to require that each contracting state "ensure[s] to all individuals within its territory . . . the rights recognized in the present covenant, without distinction of any kind, such as race, color, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status." *See id.*

doctrine.[63] Furthermore, although *Chevron U.S.A. v. Natural Resources Defense Council*[64] and its progeny hold that the judiciary must generally defer to the Executive department's construction of a statutory scheme, it is not controlling in all instances.[65] Rather, when an agency's interpretation of a particular statute raises a substantial constitutional question, traditional *Chevron* principles of deference do not apply.[66] In such instances, it is the role of the judiciary to

63. *See* Yamataya v. Fisher, 189 U.S. 86, 101-02 (1903) (narrowly construing the government's exercise of plenary power over resident aliens).

64. 467 U.S. 837, 842-43 (1984) (holding that where a statute is silent or ambiguous, the appropriate agency's interpretation should be granted deference as long as it is based on a permissible construction of the statute).

65. *See id.* at 865-66 (explaining that, in situations where Congress inadvertently or intentionally did not resolve a situation involving competing policy interests, it is most appropriate to allow the agency charged with the administration of a specific statute to make the relevant policy choices); *see also* INS v. Aguirre-Aguirre, 526 U.S. 415, 424-25 (1999) (incorporating *Chevron* principles and finding judicial deference appropriate to the Bureau of Immigration Appeal's interpretation of "withholding of deportation" under the Immigration and Nationality Act). *See generally* Sanford N. Greenberg, *Who Says It's A Crime?: Chevron Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability*, 58 U. PITT. L. REV. 1 (1996). Greenberg analyzes the Court's two-step process for determining how statutes, which have been assigned to specific administrative agencies for implementation, should be interpreted. *See id.* at 7. Step (1) requires the court to determine whether or not the "precise question at issue" has been addressed by Congress. *See id.* at 8. If so, administrators as well as the courts must "give effect to the unambiguously expressed intent of Congress." *See id.* In step (2), if the court decides that the statute is ambiguous, then the court must defer to "permissible" or "reasonable" interpretations offered by the relevant agency assigned by Congress to administer the statute. *See id.* at 8-9. The *Chevron* Court advocated for judicial deference to the specialized expertise of administrators, believing that, in general, agencies are likely to know more about the issue being regulated and are more accountable to the public for decisions they make. *See id.* at 9. *But see* Deborah E. Anker, *Discretionary Asylum; A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 VA. J. INT'L L. 1, 50 n.230 (1987) (arguing that *Chevron's* power is limited, and recently has been restricted to circumstances where specific legal standards are applied to particular facts). *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 445, nn.29-30 (1987) (declining the INS' request for heightened deference as to the agency's interpretation of the Refugee Act of 1980); International Union, UAW v. Brock, 816 F.2d 761, 765 n.5 (D.C. Cir. 1987) (reasoning that *Chevron* and *Cardoza-Fonseca* indicate that the interpretation of statutes is a question of statutory construction for courts to decide and declining to defer to the Secretary of Labor's interpretation of the Trade Act and the Vietnam Era Veterans Readjustment Act of 1972).

66. *See, e.g.*, Williams v. Babbitt, 115 F.3d 657, 666 (9th Cir. 1997) (holding that the Interior Board of Indian Appeals' (IBIA) construction of the Reindeer Industry Act raised grave constitutional questions under the Equal Protection Clause, and therefore declining to grant judicial deference to the IBIA's interpretation); *see also* DeBartolo Corp. v. Fla. Gulf Coast Trades Council, 485 U.S. 568 (1988) (finding that the National Labor Relations Board's (NLRB) interpretation of the National Labor Relations Act raised serious First Amendment questions, and refusing to defer to the NLRB); Chamber of Commerce v. Fed. Election Comm'n, 69 F.3d 600, 605 (D.C. Cir. 1995) (holding that a Federal Election Commission rule raised troubling constitutional questions and declining the agency's interpretation judicial deference). *See generally* J. Clark Kelso & Charles D. Kelso, *Statutory Interpretation: Four Theories in Disarray*, 53 SMU L. REV. 81 (2000) (providing an analysis of the opinions of the Supreme Court for the 1998 term and classifying each opinion

interpret the statute's meaning.[67]

C. Interpreting IIRIRA: A Divergence of Opinions

1. The Ninth Circuit

The IIRIRA plainly states, if "an alien . . . has been determined by the Attorney General to be a risk to the community or [is] unlikely to comply with the order of removal, [that alien] may be detained beyond the [ninety-day] removal period."[68] Herein lies the problem: due to the absence of a maximum time frame beyond the 90-day removal period, the INS has argued that it has the authority to detain such aliens indefinitely.[69] In deciding *Ma*, however, the Ninth Circuit found this interpretation to be incorrect; holding that INS officials could not continue to jail aliens after the ninety-day removal period if deportation could not be effected within the "reasonably foreseeable future."[70]

The *Ma* court acknowledged that the Attorney General's interpretation of immigration laws ought to be afforded substantial deference.[71] The court, however, noted that Ma's status as a resident alien entitles him to certain constitutional protections.[72]

---

involving statutory interpretation by the theory of interpretation underpinning it); William Funk, Supreme Court News, *Supreme Court Addresses Chevron in Several Cases*, 24 SUM ADMIN. & REG. L. NEWS 4 (1999); Greenberg, *supra* note 65, at 1 (discussing proposed exceptions to *Chevron* deference with regard to criminal liability and deportation statutes). Because both criminal sanctions and deportation of aliens involve very harsh results, it has been argued that courts should construe these types of administrative statutes narrowly to avoid overreaching by prosecutors and immigration officials, which could result in decisions that are not clearly authorized by Congress. *See id.*

67. *See* Ma v. Reno, 208 F.3d 815, 821 n.13 (9th Cir. 2000); *see also* Williams v. Babbitt, 115 F.3d 657, 662 (9th Cir. 1997) ("When agencies adopt a constitutionally troubling interpretation . . . we can be confident that they not only lacked the expertise to evaluate the constitutional problems, but probably didn't consider them at all."); Gilbert v. NTSB, 80 F.3d 364, 367 (9th Cir. 1996) (noting that because agencies have neither the power nor the jurisdiction to resolve challenges to the constitutionality of statutes promulgated by them, such issues must be resolved by the courts if they amount to more than "mere procedural errors"); *1990 Term Leading Cases*, 105 HARV. L. REV. 177, 398 (1991) ("When constitutional rights are implicated . . . the balance of values clearly shifts against agency deference.").

68. 8 U.S.C. § 1231(a)(6) (1999).

69. *See Ma*, 208 F.3d at 821.

70. *See id.* at 822.

71. *See id.* at 821 n.13 (citing INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (holding that courts must adhere to the principles of *Chevron* deference when addressing issues regarding an executive agency's construction of a statute, which that agency is charged with administering)).

72. *See id.* at 825 ("[O]ur case law makes clear that, as a general matter, aliens who have entered the United States, legally or illegally, are entitled to the protections of the Fifth Amendment."). *See also* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (stating that aliens within the United States are protected by the

Furthermore, because the INS' interpretation of IIRIRA raised a substantial constitutional question, namely whether indefinite detention violates aliens' due process rights, the court concluded that traditional *Chevron* principles of judicial deference did not control.[73]

As a result, the Ninth Circuit refused to defer to the Attorney General's interpretation of IIRIRA, thereby becoming the first circuit court to hold that IIRIRA does not authorize the INS' policy of indefinite detention.[74] In so doing, the court invoked the doctrine of constitutional narrowing,[75] which allowed it to read into the statute an implied "reasonable time limitation" for purposes of detention.[76] By way of explanation, Judge Reinhardt, writing for the majority, stated, "[o]ur reading . . . better comports with the language of the statute and permits us to avoid assuming that Congress intended a result as harsh as indefinite detention in the absence of any clear statement to that effect."[77] Indeed, as the Ninth Circuit stated in a similar case: "if

Fourteenth Amendment); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (holding that resident aliens are owed a measure of due process protection).

73. *See* Ma, 208 F.3d at 821, n.13; *see also* Chevron, U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984) (citing, *inter alia*, various case law that has held that when serious constitutional questions arise, the judiciary will not extend the same level of deference to the executive agency); Vitek v. Jones, 445 U.S. 480, 491-94 (1980) (recognizing the need for judicial review of an agency's decision to involuntarily commit a patient to a mental institution and stating that when enforcing laws which impose "conditions . . . so severe or different from ordinary conditions of confinement" they must comply with the minimum requirements of due process).

74. *See* American Civil Liberties Union (ACLU) Press Release, *Federal Appeals Court Says INS Must Free Indefinitely Detained Immigrants*, Apr. 10, 2000, *available at* http://www.aclu.org/news/2000/n041000c.html ("'Today's ruling marks a victory for fundamental fairness in America,' said Judy Rabinovitz, Senior Staff Counsel of the American Civil Liberties Union's Immigrants Rights Project.").

75. *See* Williams v. Babbitt, 115 F.3d 657, 662-63 (9th Cir. 1997) (defining constitutional narrowing as when courts elect to construe statutes in such a way as to avoid deciding difficult, serious, or grave constitutional questions). The court noted in *Williams*, that agencies can adopt any interpretation they wish, so long as that interpretation does not infringe on constitutional rights. *See Williams*, 115 F.3d at 662. Additionally, Congress can remove any uncertainties about the meaning of a statute by making it clear that it chose the "constitutionally doubtful interpretation," thereby forcing the courts "to confront the constitutional question squarely." *See id.* at 662-63.

76. *See Ma*, 208 F.3d at 822 (stating that such a reading was consistent with previous statutory interpretation of similar immigration laws). Courts have often read limitations into statutes that appear to give broad power to immigration officials. *See* United States v. Witkovich, 353 U.S. 194, 199 (1957) (limiting a statute that penalized aliens for refusing to answer questions asked by an immigration official, even though that statute did not expressly do so, because the Court reasoned that only if aliens refused to answer questions "relevant to legitimate government purposes" could they suffer legal consequences); Romero v. INS, 39 F.3d 977, 981 (9th Cir. 1994) (finding a rule that required aliens to answer truthfully all questions posed by immigration officials to include an implicit applicability to only "questions relevant to their visa status.").

77. *Ma*, 208 F.3d at 822.

Congress means to push the constitutional envelope, it must do so explicitly."[78]

2. The Tenth Circuit

The Tenth Circuit, in *Ho v. Greene* and *Nguyen v. Greene*,[79] faced situations similar to that posed in *Ma*. However, unlike the Ninth Circuit, the Court in those cases concluded that INS' indefinite detention policy is permissible. Like Ma, both Ho and Nguyen entered the United States lawfully as refugees.[80] Both were later separately convicted of aggravated felonies and ordered deported by the INS.[81] Their native country, Vietnam, refused to issue travel documents allowing for their return, and consequently the INS placed them in detention indefinitely.[82] The District Court, hearing both cases, ordered them released, finding indefinite detention unconstitutional.[83] The Tenth Circuit reversed the decisions, however, basing its holding on both statutory and constitutional arguments.[84]

Like the Ninth Circuit, the Tenth Circuit focused its statutory analysis on the section of IIRIRA's detention provision that states that "[a]n alien . . . who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period."[85] Unlike the Ninth Circuit, the Tenth Circuit did not find anything ambiguous about the IIRIRA's detention provisions.[86] Rather than interpreting the language as including an implicit reasonable time limit, the Tenth Circuit interpreted the absence of a specific time limit as explicitly granting the Attorney General the discretion to detain

78. *Williams*, 115 F.3d at 662 (holding that construction of a statute to prohibit reindeer herding raised grave constitutional questions) (citing Edward I. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trade Council, 458 U.S. 568, 575 (1988) (holding that NLRB's interpretation of the relevant statute raised serious First Amendment questions)).

79. 204 F.3d 1045 (10th Cir. 2000) (The Tenth Circuit consolidated the cases of *Ho* and *Nguyen* as they both addressed the Attorney General's statutory authority to indefinitely detain a removable alien).

80. *See id.* at 1049.

81. *See id.*

82. *See id.* at 1050 (denying Nguyen and Ho's release because they failed to prove that they were no longer a threat to the community or a flight risk).

83. *See id.* at 1052 (explaining the District Court's holding, which did not address the statutory argument, but instead found that "prolonged detention constituted unconstitutional incarceration").

84. *See id.* at 1060 (holding that IIRIRA authorizes indefinite detention and that neither Ho nor Nguyen have a liberty interest deserving Due Process safeguards).

85. 8 U.S.C. § 1231(a)(6) (1999).

86. *See Ho*, 204 F.3d at 1056 (reasoning that because the statute does not specify any time limit on the INS' authority to continue to detain, Congress intended to allow for the indefinite detention of certain removable aliens).

indefinitely certain removable aliens beyond the removal period.[87]

This decision, however, is contrary to a previous outcome reached by the Tenth Circuit in a similar case. In *Rodriguez-Fernandez v. Wilkinson*,[88] the Tenth Circuit refused to construe a similar detention provision as permitting the Attorney General to detain indefinitely an excludable alien who could not be removed expeditiously.[89] The *Rodriguez-Fernandez* majority concluded that the INS was authorized to detain excludable aliens only "during proceedings to determine eligibility to enter and, thereafter, during a reasonable period of negotiations for their return to the country of origin or to the transporter that brought them here."[90]

The *Ho* court distinguished its holding from *Rodriguez-Fernandez* however, reasoning that the specific section of the statute analyzed in *Rodriguez-Fernandez* was ambiguous, and therefore, an imposition of a reasonable time limit on detention was a viable interpretation in that instance.[91] In *Ho*, the court was unwilling to extend the same logic, and expressly declined to "substitute its judgment for that of Congress by reading in a time limit that is not included in the plain language of [IIRIRA]."[92] More specifically, the court concluded that by drafting IIRIRA as it did, Congress intended to, and expressly did, authorize the Attorney General to detain indefinitely certain removable aliens.[93]

D. The Supreme Court Should Uphold the Ninth Circuit's Interpretation

As the preceding sections demonstrate, the Ninth and Tenth Circuits are split over how to interpret the detention provisions of IIRIRA. The Supreme Court recently granted certiorari and heard arguments, hoping to resolve this disagreement within the circuits.[94]

87. *See id.* (concluding that because Congress did not include a limiting provision in 8 U.S.C. § 1231(a) they must have intended to allow for the indefinite detention of aliens).

88. 654 F.2d 1382 (10th Cir. 1981).

89. *See Rodriguez-Fernandez*, 654 F.2d at 1382.

90. *Id.* at 1389.

91. *See Ho*, 204 F.3d at 1056. The statute analyzed in *Rodriguez-Fernandez* was former 8 U.S.C. § 1227(a)(1); it instructed the Attorney General to carry out an excludable alien's deportation at once, "unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practical or proper." 8 U.S.C. § 1227(a)(1) (1952).

92. *Id.* at 1057 (citing Pueblo of San Ildefonso v. Ridlon, 103 F.3d 936 (10th Cir. 1996) for the proposition that "[w]here statutory language is clear and unambiguous, that language is controlling and courts should not add to that language.").

93. *See Ho*, 204 F.3d at 1056 (noting that the unambiguous language of 8 U.S.C. § 1231(a)(6) led the court to conclude that Congress intended to allow for indefinite detention).

94. *See* Reno v. Kim Ho Ma, 121 S. Ct. 297 (Oct. 10, 2000) (consolidating the case

Because the Tenth Circuit's interpretation does not comport with prior Supreme Court rulings that afforded non-excludable aliens the protections of the Constitution,[95] the Supreme Court should uphold the Ninth Circuit's reading of the statute as outlined in *Ma v. Reno*, thereby ensuring fair and consistent application of the law to aliens within the territorial jurisdiction of the United States.

The Supreme Court should uphold the Ninth Circuit's interpretation because the Constitution mandates that aliens within the United States be afforded some measure of due process. The Fifth and Fourteenth Amendments of the Constitution state that no person may be deprived of "life, liberty or property, without due process of law."[96] Liberty from confinement is at the heart of the liberty interests protected by the Due Process Clause.[97] Therefore, an interpretation of a statute that radically eviscerates liberty rights by permitting a governmental agency to detain aliens indefinitely, clearly contradicts well-established Supreme Court precedent granting aliens within U.S. borders constitutional protection.[98] It is unlikely that Congress intended IIRIRA to have this effect.

Congress likely included the statutory language, "may be detained beyond the removal period" in recognition that the Attorney General may occasionally need to temporarily detain removable aliens beyond the ninety-day limit to effectuate their deportation.[99] When it is unlikely that deportation will occur in the foreseeable future, however, the legitimacy of continued INS detention must be weighed

---

with Zadvydas v. Underdown, 121 S. Ct. 297 (Oct. 10, 2000)).

95. *See* Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.").

96. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

97. *See Ho*, 204 F.3d at 1062 (Brorby, J., dissenting) ("Liberty is one of those basic rights enjoyed by all 'persons,' as '[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause.'") (quoting Foucha v. Louisana, 504 U.S. 71, 80 (1992)). Judge Brorby notes that this infringement of the Constitution is subject to strict scrutiny, and therefore, must be narrowly tailored to serve a compelling government interest. *See id.* at 1062. In applying a strict scrutiny test to indefinite detention, first it must be determined whether the detention at issue is being imposed as punishment or for a legitimate regulatory purpose. *See id.* If the detention is intended as a legitimate regulation, strict scrutiny dictates that it not be excessive in relation to the regulatory purpose Congress sought to achieve. *See id.*

98. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that aliens within the United States enjoy some measure of the protections afforded by the Constitution); *see also* Plyler v. Doe, 457 U.S. 202 (1982) (same); Mathews v. Diaz, 426 U.S. 67, (1976) (same); Wong Wing v. United States, 163 U.S. 228 (1896) (same).

99. *See* Ma v. Reno, 208 F.3d 815 (9th Cir. 2000) (finding that Congress made provisions in the statute for the Attorney General to hold aliens beyond the specified time limit in order to give her flexibility in instances where additional time could be useful).

in relation to the fundamental guarantees of due process.[100] Therefore, the Supreme Court should resolve the circuit court split by finding that the detention provisions of IIRIRA infer a reasonable time limit, thus confirming that removable aliens may not be indefinitely detained.

III. CONSTITUTIONAL ANALYSIS

A. Supreme Court Precedent Affording Aliens Due Process Protection

The Constitution guarantees that due process protections "are universal in their application, to all persons within the territorial jurisdiction [of the United States] without regard to any differences of . . . nationality."[101] Hence, even when an alien has been convicted of a crime that may justify his removal from the United States, he nevertheless remains a person who cannot be deprived of his liberty without due process of law.[102]

Several Supreme Court cases have upheld the principle that all individuals within U.S. borders enjoy constitutional protection.[103] In *Wong Wing v. United States*,[104] while the Court acknowledged the executive agency's power over immigration issues, it struck down a statute authorizing the Attorney General to imprison illegal aliens for one year before deporting them.[105] The Court based its holding on

100. The INS may argue that prolonged detention of aliens previously convicted of felonies is justified, because they pose a danger to society, however past offenses alone do not warrant indefinite confinement. *See* Kansas v. Hendricks, 521 U.S. 346, 358 (1997) (holding "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment").

101. *Yick Wo*, 118 U.S. at 369.

102. *See* Plyler v. Doe, 457 U.S. 202, 210 (1982) (finding that even aliens who have entered the country illegally are protected by the Fifth and Fourteenth Amendments).

103. *See Plyler*, 457 U.S. at 230 (ruling that undocumented aliens' children enjoy constitutional right to education); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (holding that the Fifth and Fourteenth Amendments protect all those within the jurisdiction of the United States); Leng May Ma v. Barber, 357 U.S. 185, 187 (1958) (distinguishing between aliens seeking admission to the United States and those within our borders); Kwong Hai Chew v. Colding, 344 U.S. 590, 602-03 (1953) (holding that a resident alien seeking re-entry into the United States is entitled to the constitutional protections afforded to a resident alien rather than an excludable alien); Wong Wing v. United States, 163 U.S. 228, 237-38 (1896) (affirming that aliens within the United States are protected by the Fifth and Sixth Amendments, and may not be punished without a criminal trial even though ordered deported after completion of their sentences); *Yick Wo*, 118 U.S. at 368-69 (acknowledging that all aliens within the United States are protected by the Fourteenth Amendment).

104. 163 U.S. 228, 237-38 (1896).

105. *See id.* at 237 ("When Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.").

the idea that "even aliens shall not be held to answer for a . . . crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law."[106]

In *Plyler v. Doe*,[107] the Supreme Court affirmed aliens' due process rights, stating:

> [w]hatever his status under the immigration laws, an alien is surely a "person" in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments.[108]

The Court also held in *Shaugnessy v. United States*[109] that even aliens who have entered the country illegally are entitled to due process before being deported.[110] And again, in *Leng May Ma v. Barber*,[111] the Court recognized that aliens within U.S. borders are entitled to rights and privileges that those who stand at the "threshold of our borders" do not enjoy.[112] The above-cited cases support the notion that aliens are guaranteed certain constitutional protections that are not subject to change with the advent of a removal order.[113]

106. *Id.* at 238.
107. 457 U.S. 202, 210 (1981).
108. *Id.* at 210.
109. 345 U.S. 206, 212 (1953).
110. *See id.* at 212 ("Aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.").
111. 357 U.S. 185, 186 (1958) (holding "petitioner's parole did not alter her status as an excluded alien").
112. *See id.* at 187 ("[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality.").

113. Several federal courts have also explicitly determined that removable aliens are entitled to constitutional due process protections. *See* Leader v. Blackman, 744 F. Supp. 500, 507 (S.D.N.Y. 1990) (stating, "substantive due process prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.'") (quoting United States v. Salerno, 481 U.S. 739, 746 (1987)) (citation omitted). In *Leader*, the court analyzed the petitioner's due process claim by analogizing "detention pending a deportation hearing" to "pretrial detention," and applied a modified strict scrutiny test from *Salerno*. *See id.* at 507-08 (finding "the analogy to pretrial detention appropriate, at least for purposes of defining the proper scope of inquiry"). The *Salerno* test asked (1) whether the restriction placed on the alien's liberty is "impermissible punishment or permissible regulation"; and (2) whether it is "excessive in relation to the regulatory goal Congress sought to achieve." *Salerno*, 481 U.S. at 747. The *Leader* court found that the means chosen (the provision for mandatory detention without bail) were excessive to accomplish the government's legitimate end (preventing aliens from absconding pending deportation). *See Leader*, 744 F. Supp. at 508 (stating that mandatory detention without bail was unconstitutional as a violation of both procedural and substantive due process); *see also* Agunobi v. Thornburgh, 745 F. Supp. 533, 536-37 (N.D. Ill. 1990) (applying the *Salerno* test to find that indefinitely detaining aliens who have been convicted of aggravated felonies as a means of

B. Fifth and Tenth Circuit's Analysis

Despite Supreme Court precedent holding that aliens who have entered the United States are entitled to due process protections under the Fifth and Fourteenth Amendments,[114] several circuit courts have declared that detaining removable aliens indefinitely beyond their original prison sentences is not unconstitutional.[115] These decisions are premised upon a legal fiction: that even when an alien is physically present in the country, once he has been ordered deported, he is stripped of his constitutional rights.[116] As a result, the alien who has entered and lived in the United States for many years essentially stands on the same footing as an excludable alien seeking to enter the country for the first time.[117]

---

preventing them from absconding pending deportation hearings was excessive government conduct). The use of a strict scrutiny analysis in these cases, as opposed to a more deferential analysis to determine the constitutionality of INS' policy, makes it clear that deportable aliens have protectable due process rights. For more on the application of strict scrutiny to cases involving indefinite detention, *see* Debora Ann Gorman, Note, *Indefinite Detention: The Supreme Court's Inaction Prolongs the Wait of Detained Aliens*, 8 GEO. IMMIGR. L.J. 47 (1994) (applying a "'representation-reinforcing' theory of constitutional interpretation to examine the role played by the federal courts in upholding the INS' policy of indefinite detention of certain aliens pending deportation or exclusion proceedings").

114. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 77 (1976)

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.

Id. (citations omitted).

115. *See* Ho v. Greene, 204 F.3d 1045, 1060 (10th Cir. 2000) ("Both petitioners are properly characterized as inadmissible aliens seeking temporary entry into the United States. Notwithstanding their physical presence in this country, they have no constitutional rights regarding their application for entry."); *see also* Zadvydas v. Underdown, 185 F.3d 279, 296-97 (5th Cir. 1999) (holding, similar to the court in *Ho*, that indefinite detention of an alien that has been ordered removed by the Attorney General is not a violation of the Constitution).

116. *See* Ho, 204 F.3d at 1058 (citing 8 U.S.C. § 1101(a)(20) (Supp. II 1996); 8 C.F.R. § 1.1(p) (1999)

> The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion or deportation.

Id.

The *Ho* court concluded from this that even though Ho and Nguyen were physically present in the United States, the removal orders issued against them meant they now had the same constitutional rights, with respect to their applications for admission, as aliens seeking to enter the country for the first time. *See id.* at 1060 ("Hence, the Due Process Clause does not provide petitioners a liberty interest in the right they assert, i.e., the right to be temporarily admitted into this country.").

117. *See Zadvydas*, 185 F.3d at 296 (arguing both excludable and resident aliens could come into conflict with the government's sovereignty interests, therefore when

For example, in *Zadvydas v. Underdown*,[118] the Fifth Circuit found that when a permanent resident alien becomes the subject of a final order of deportation, that alien is no longer a permanent resident and hence possesses the same level of constitutional protection as an excludable alien.[119] Because of the alien's new status, the need to expel him from a national sovereignty perspective, is identical to the need to remove an excludable alien who has been ordered returned to his country of origin.[120]

The Fifth Circuit reasoned in *Zadvydas* that because excludable and removable aliens are viewed in the same light with respect to deportation, the government has every right to treat them similarly with respect to detention.[121] Consequently, the Court found that, as with excludable aliens, continued detention of the resident alien did not violate the Due Process Clause of the Constitution.[122] Similarly, in *Ho v. Greene*,[123] the Tenth Circuit found that, "[l]ike an alien seeking initial entry, [deportable aliens] have no right to be at large in the United States."[124] Based on this theory, the court determined that

this occurs they should both be allocated the same level of constitutional protection).

118. 185 F.3d at 283 (concerning resident alien who had been born in a displaced persons camp in Germany and immigrated to America at the age of eight. He subsequently developed an extensive criminal history and was ordered deported by the INS after spending several years in prison. German officials however were unwilling to accept Zadvydas.).

119. *See id.* at 295 n.18 (challenging the notion that previous Supreme Court decisions have implied an "across-the-board difference" in the constitutional status of excludable and removable aliens).

120. *See id.* at 296 (arguing that given the circumstances, the national interest in deporting the petitioner was the same regardless of whether the alien was a resident or excludable); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) ("The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power."). The *Zadvydas* Court determined that another compelling reason to treat the two situations similarly is that often, when released, both resident and excludable aliens alike disappear within the country and are difficult to locate once the government is able to effectuate deportation. *See Zadvydas*, 185 F.3d at 297 (explaining how "[t]hese interests are both equally potentially present regardless of whether an aliens was once resident or excludable").

121. *See Zadvydas*, 185 F.3d at 296 (arguing that just because the government has difficulty in immediately deporting an alien, this does not necessarily recreate a distinction in the government's interest with regard to excludable and resident aliens).

122. *See id.* at 296-97 (stating there is no Supreme Court case suggesting that deportable aliens have some greater right to release from detention than excludable aliens subject to the same incarceration).

123. 204 F.3d 1045, 1059-60 (10th Cir. 2000) (concerning Vietnamese refugees who fled to America, were later convicted of aggravated felonies and subsequently ordered removed by the INS, yet their country of origin would not accept their return).

124. *Id.* (finding that although Ho had lived in the United States for many years, the INS' final removal orders against him stripped him of any heightened constitutional rights he may have had before the removal orders were entered).

there is no substantive or procedural due process impediment to continued detention of removable aliens.[125]

C. Ninth Circuit's Analysis

The court in *Ma v. Reno* purposely elected not to decide the constitutionality of the INS' indefinite detention policies, noting, "[t]he Supreme Court has long held that courts should interpret statutes in a manner that avoids deciding substantial constitutional questions."[126] The Ninth Circuit, however, did point out in dicta that the INS' extension of exclusion law to aliens within United States territory, who have been ordered removed, raises significant constitutional concerns.[127]

Specifically the court noted that in order to adopt the INS' approach, it would have to reconcile Supreme Court precedent upholding removable aliens' rights to constitutional protection, with the INS' suggested rule essentially stripping them of this protection.[128] The court refused to take on this, "daunting, if not impossible, task."[129]

Dicta in the *Ma* case suggests that the Ninth Circuit disagrees with

---

Thus, *Ho* indicated that while there are distinctions between the rights of resident aliens and the rights of excludable aliens, once ordered deported, a resident alien stands on the same constitutional footing as an excludable alien and is not entitled to due process protections. *See id.*

125. *See id.* at 1060 (finding no case law to support the assertion that "a deportable alien subject to a final order of deportation and being detained by the United States pending that deportation possess greater constitutional rights than an excludable alien in the same position"). When the Tenth Circuit considered the constitutionality of indefinite detention, it accepted the Fifth Circuits view by a 2-1 vote with Justice Brorby dissenting. In his vigorous dissent in *Zadvydas*, Justice Brorby charged that indefinite detention of the petitioners may well violate the substantive due process rights granted by the Constitution, in a matter that "shocks the conscience." *See id.* at 1060-63 (rejecting the notion that petitioners have no liberty rights).

126. Ma v. Reno, 208 F.3d 815, 822 (9th Cir. 2000) (citing DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)(construing a statute regarding publicity in such a way so as to avoid deciding on the serious First Amendment questions) and United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916) (finding that the act regarding revenue measures and treaty obligations must be construed so as not to violate the constitution)). In invoking the notion of "constitutional avoidance," the Court rationalized that because it interpreted the statute as not permitting the indefinite detention of removable aliens, it did not need to decide the significant constitutional questions that were raised by the INS' interpretation, authorizing indefinite detention. *See id.* at 821-23 (stating that "[i]n the immigration context, courts have often read limitations into statutes that appeared to confer broad power on immigration officials in order to avoid constitutional problems").

127. *See id.* at 825-26 n.23 (questioning the Fifth Circuit's construction of § 1231(6) and subsequent conclusions in *Zadvydas*).

128. *See id.* at 826 (noting that the court "would have to reconcile *Wong Wing*, which affords constitutional protection to aliens who have been ordered deported").

129. *Id.*

the decisions of the Fifth and Tenth Circuits, upholding the INS' extension of exclusion law to aliens within United States' territory.[130] While technically there may not be a split between the circuits on this constitutional question, there certainly is not unanimity on the issue. Consequently, the Supreme Court should resolve the tension between the courts in order to push Congress to enact clarifying legislation and to ensure the law is applied equitably and consistently to all aliens.

D. Resolving the Tension

Close analysis reveals the Fifth and Tenth Circuits employed faulty logic in upholding the INS' indefinite detention policies. These courts contend that a final removal order strips an alien of any heightened constitutional status he may have enjoyed prior to issuance of the removal order. As Judge Brorby aptly stated in his dissent in *Ho*, this reasoning "is supported only by a tenuous foundation of legal fiction stacked upon legal fiction."[131]

Essentially these courts have determined that removable aliens do not possess protected liberty interests in avoiding unjustified detention, because their removal order "converts" them into excludable aliens.[132] Having created this fiction, courts then are able to characterize immigrants, who are physically present within U.S. borders, as never having entered into the country. This characterization, in turn, strips the alien of any due process protections he may otherwise have enjoyed.[133] Consequently, while these newly created excludable aliens previously may have enjoyed constitutional protections against imprisonment for purposes other than punishment for a criminal offense, their detention now is simply characterized as an extension of exclusion proceedings and therefore subject to the discretion of the Attorney General.[134]

130. *See id.* at 827 (demonstrating the Ninth Circuit did not explicitly hold that the INS' detention policy is unconstitutional, but dicta in the opinion alluded to as much when the court pronounced, "[e]ven if we were to agree with the Fifth Circuit's constitutional holding—and we do not by any means suggest that we do"). While this dicta is not controlling, it is significant; shedding light on how the court views this policy and how it may rule on this issue in the future.

131. *Ho*, 204 F.3d at 1061 (Brorby, J., dissenting).

132. *See id.* at 1058 (contending it is most appropriate to view the liberty interests at stake in these cases from the perspective of an excludable alien who has requested entry into the United States and has been denied, and consequently is being indefinitely detained because his country of origin will not accept him back).

133. *See id.*

134. *See id.* at 1061 (Brorby, J., dissenting) (discussing the majority's conclusion that detention is simply an extension of the exclusion proceedings and consequently falls within the plenary power of the political branches to govern immigration matters).

Contrary to the Fifth and Tenth Circuits' reasoning, an alien's due process rights are not extinguished by a final removal order against him. In fact, these courts' denial of due process protections expressly contradicts well-established Supreme Court precedent recognizing that the Constitution's most fundamental guarantees apply both to citizens and non-citizens, including non-citizens who have entered the United States illegally.[135] This line of cases firmly establishes that removable aliens are 'persons' protected by the Fifth and Fourteenth Amendments.[136]

Because it is clear that removable aliens do retain their constitutional rights,[137] and because liberty from bodily restraint is a fundamental right protected by the Due Process Clause,[138] any infringement of this right must be strictly scrutinized to determine whether the policy is "narrowly tailored to serve a compelling state interest."[139] Essentially, strict scrutiny demands that the government's interest in regulation be balanced against the likelihood that it will be able to effectuate deportation within a reasonable time period.[140]

Without a doubt the government has a significant interest in protecting the public from dangerous felons and in preventing aliens

135. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) (recognizing that a permanent resident alien returning from abroad enjoys due process rights even in an exclusion proceeding); Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903) (concluding that even excludable aliens enjoy due process rights in deportation proceedings); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that the Constitution mandates that a judicial trial be held before a deportable alien can be punished by imprisonment pending deportation).

136. *See supra* Part III.A (discussing the Supreme Court's due process jurisprudence with respect to aliens).

137. *See* Ma v. Reno, 208 F.3d 815, 824 (9th Cir. 2000) (stating, "[o]ur case law makes clear that, as a general matter, aliens who have entered the United States, legally or illegally, are entitled to the protections of the Fifth Amendment.").

138. *See* Foucha v. Louisana, 504 U.S. 71, 80 (1992) (recognizing that freedom from bodily restraint is at the core of the liberty protected by the Due Process Clause).

139. Reno v. Flores, 507 U.S. 292, 302 (1993) (discussing the substantive component of the Fifth and Fourteenth Amendments' Due Process Clause); *see also* United States v. Salerno, 481 U.S. 739, 747 (1987) (holding that if the detention is to serve a legitimate regulatory purpose (and is not intended as punishment) then strict scrutiny dictates that the detention cannot be "excessive in relation to the purpose Congress sought to achieve").

140. Similar balancing tests have been used when reviewing other types of administrative detention. *See, e.g.*, United States v. Hare, 873 F.2d 796, 801 (5th Cir. 1989) (determining whether or not detention violated due process, the court weighed the seriousness of the charges against the length of detention that had occurred or could occur in the future); United States v. Gelfuso, 838 F.2d 358, 359 (9th Cir. 1988) (finding that whether or not pre-trial detention violates due process depends on both the length of confinement and the extent to which the prosecution is responsible for the delay); United States v. Theron, 782 F.2d 1510, 1516-17 (10th Cir. 1986) (finding that four months in detention before trial was too long, given that defendant had not played a part in the delay, and that due process required that he be released on bond or tried within thirty days).

from absconding prior to deportation.[141] The Due Process Clause, however, dictates that society must accept certain risks to avoid unjustifiable deprivations of liberty.[142] As the probability of removing the alien lessens, the government's interest in detaining him becomes less compelling, and consequently, the infringement of the alien's liberty interest becomes more severe.[143]

It follows therefore, that the INS can lawfully detain aliens only if it aids in their removal. Thus, indefinite detention is "excessive" if removal will not occur in the foreseeable future.[144] Hence, the Supreme Court should overturn the Fifth and Tenth Circuits' holdings allowing the INS' indefinite detention policies because they do not pass the strict scrutiny analysis that is required when liberty interests are at stake.

IV. COMPLYING WITH INTERNATIONAL LAW

Not only does indefinite detention of removable aliens violate the Constitution, it also contradicts international norms and standards.[145]

141. *See* Zadvydas v. Underdown, 185 F.3d 279, 296-97 (5th Cir. 1999) (accepting a "certain risk of recidivism" among criminal citizens while refusing to be "similarly generous" with non-citizens, and therefore concluding criminal aliens should be deported or excluded).

142. *See* United States v. Gonzales Claudio, 806 F.2d 334, 340 (2d Cir. 1986) (setting forth a three-prong test examining the length of pre-trial detention, the extent of the prosecution's responsibility for delay, and the strength of the evidence offered on whether the defendant presents a risk of flight in considering the limits on pre-trial detention).

143. *See* Phan v. Reno, 56 F. Supp. 2d 1149, 1156 (W.D. Wash. 1999) (finding that as the likelihood of an alien's deportation decreases, so does the government's interest in detention, and that prolonged detention under such circumstances may constitute a violation of the alien's substantive due process rights); *see also* Michael Williams, Comment, *Doherty v. Thornburgh—Deportable Aliens Detained and Deprived of Their Liberty: A Substantive Due Process Analysis*, 18 BROOK. J. INT'L L. 845, 858-60 (1992) (analogizing detention pending deportation to pre-trial detention and concluding that the same balancing tests used to determine whether pre-trial detention has become excessive also should be used in examining detention pending deportation).

144. *See Phan*, 56 F. Supp.2d at 1156 (finding the lower the probability that the government will be able to deport an alien, the less the interest the government has in taking measures to effectuate that deportation).

145. It is not always clear however, what the status of international law is, in relation to U.S. domestic law. *See generally* The Paquete Habana, 175 U.S. 677, 700 (1900) (recognized as the first case to hold that, "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"). The *Paquete Habana* court qualified its holding, however, by noting that for the purpose of adjudicating matters, where no treaty, nor controlling executive or legislative act, nor judicial decision exists, courts must resort to the customs and usages of "civilized nations." *See id. See generally* Joan Fitzpatrick & William McKay Bennett, *A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States*, 70 WASH. L. REV. 589 (1995) (providing a general overview on the status of international law with regard to immigration matters). In laying out the basic conceptual framework for how international law is

In the past the Supreme Court has sought support in international law principles when analyzing issues surrounding Congress' plenary power over exclusion and deportation of aliens.[146] Therefore, it is appropriate to examine international law principles when analyzing the justness of detention policies as applied to aliens.[147]

It is a fundamental principle of human rights that no one should be arbitrarily placed in detention.[148] The Universal Declaration of

applied in the United States, Fitzpatrick and Bennett begin by noting that treaties are regarded as the supreme law of the land. *See id.* at 591 (citing U.S. CONST. art. VI). If the treaty is self-executing, it will be enforced by the judiciary. *See id.* If it is non-self-executing, Congress must first implement the treaty by statute before it can be enforced by the courts. *See id.* (citing Foster & Elam v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (discussing a treaty ceding Louisiana to the United States, noting that, "[a] treaty . . . does not generally effect, of itself, the object to be accomplished . . . but is carried into execution by the sovereign power of the respective parties to the instrument)). However, even when a non-self-executing treaty has not been implemented by statute, it still expresses a national policy binding on the states. *See id.* (recognizing that such a treaty is still regarded as the supreme law of the land). It is not always clear which branch of government has the power to lawfully terminate a treaty and therefore extinguish the nation's international obligation. *See id.* (referencing Goldwater v. Carter, 444 U.S. 996, 997-98 (1979) (Powell, J., concurring) (discussing uncertainty as to whether the executive branch had the power to terminate a treaty with Taiwan)). In determining whether a treaty or a conflicting statute is binding, U.S. case law has held that the later in time controls. *See id.* at 591-92 (citing Chae Chan Ping v. United States, 130 U.S. 581, 628 (1889) (considering the exclusion of a Chinese laborer under an act of Congress possibly in violation of a treaty with the Chinese government); Whitney v. Robertson, 124 U.S. 190, 194 (1888) (considering the tension between an act of Congress creating a duty on the importation of sugar and a treaty abrogating a duty as to certain nations); Edye v. Robertson, 112 U.S. 580, 599 (1884) (refusing to grant treaties superiority over acts of Congress)). Therefore, if Congress enacts a statute that conflicts with the obligations of a pre-existing treaty, it is the statue that will be given domestic legal effect. *See id.* at 591-92. A commonly held rule, however, provides that "statutes should not be interpreted as inconsistent with treaties unless no other construction is possible." *See id.* at 592 (citing Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (noting that the act suspending commercial intercourse between the United States and France shouldn't be construed to affect neutral commerce if any other possible construction remains)).

146. *See* Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) ("It is an accepted maxim of international law, that every sovereign nation has the power . . . to forbid the entrance of foreigners within its dominions . . . this power belongs to the political department of government.").

147. *See* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981) (using the Universal Declaration of Human Rights and the American Convention on Human Rights to support the argument that continued incarceration for administrative reasons is arbitrary and unjust).

148. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) (providing "[a] state violates international law if, as a matter of policy, it practices, encourages, or condones . . . prolonged, arbitrary detention"); *see also* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981) (observing that perhaps one of the most important principles of international law is that human beings should be free from arbitrary imprisonment); Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., 183d plen. mtg. ART. 9, at 137, U.N. Doc A/810 (1948) ("No one shall be subjected to arbitrary arrest, detention or exhile."); International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 168, U.N. Doc. A/6316 ART.

Human Rights[149] states that "no one shall be subjected to arbitrary arrest, detention or exile,"[150] and the International Covenant on Civil and Political Rights[151] similarly declares that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."[152] Detention is arbitrary when it is haphazard, unwarranted, or not accompanied by fair procedures for legal review.[153]

Additionally, the International Covenant on Civil and Political Rights provides that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[154] Thus, even when a person has been detained in conformance with the law, that person still is entitled to a timely and expeditious appeal procedure.[155]

Everyone within U.S. jurisdiction is entitled to basic human rights protections, including immigrants detained by the INS.[156] Individuals in INS detention, regardless of their immigration status, have the right to be free from arbitrary detention and to be protected from

9 PARA. 4 (1967) ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.").

149. G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948).

150. *See id.*

151. Dec. 19, 1966, S. Exec. Doc. No. 95-2, (1978), 999 U.N.T.S. 171.

152. *See id.* at 175.

153. *See* HUMAN RIGHTS WATCH, *supra* note 6, at III, Legal Standards; *see also* Weisselberg, *supra* note 47, at 1007 (maintaining that cases in international law stand for the proposition that non-criminal detention that is not reviewable by a competent court is arbitrary). When the United States confines aliens for prolonged periods without full judicial review, this detention becomes arbitrary and violates customary international law agreements. *See id.*

154. *See* International Covenant on Civil and Political Rights, *supra* note 151, at 168. *But see* Louis N. Schulze, Jr., Note, *The United States' Detention of Refugees: Evidence of the Senate's Flawed Ratification of the International Covenant on Civil and Political Rights*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 641, 651-52 (1997) (discussing the government's argument that courts should not apply the covenant because the International Covenant on Civil and Political Rights ("ICCPR") was ratified by the Senate as "non-self executing") (citing Advice and Consent, 138 Cong. Rec. S4781-01, 4784 (daily ed. Apr. 2, 1992) (declaring the treaty non-self executing)). Schulze concluded, however, that when the Executive became a party to the covenant, it gave its assurance to the international community and the Senate that United States' domestic law would comply with the Covenant. *See id.* at 678. It became apparent, however, that the executive branch's promises were misleading when the Senate ratified the Covenant as a non-self-executing treaty, and the courts began to deny domestic remedies to alien refugees. *See id.* The result is that the ratification of the Covenant as non-self-executing is invalid. *See id.*

155. *See* HUMAN RIGHTS WATCH, *supra* note 6, at III, Legal Standards.

156. *See id.*

cruel, inhuman, or degrading treatment.[157] While jails are designed to be punitive and rehabilitative institutions, many aliens in detention are jailed only because they cannot be deported.[158] Even when the initial detention is justified, that detention becomes arbitrary when a detainee, who is no longer serving a criminal sentence, does not know when he will be released and has no genuine mechanism to challenge the indefinite nature of his detention.[159]

As the court noted in *Ma*, the *Charming Betsy* rule of statutory construction[160] requires that courts construe congressional legislation in such a way that avoids violating international law.[161] Courts generally adhere to this rule "out of respect for other nations."[162]

157. *See* International Covenant on Civil and Political Rights, *supra* note 151 ("[A]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person"); *see also* The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article 16(1), G.A. Res. 39/46, Dec. 10 1984 (requiring that detainees not be subjected to any form of torture or cruel, inhuman or degrading treatment while in detention); The American Convention on Human Rights, O.A.S.T.S. No. 36, Nov. 22, 1969; The Universal Declaration of Human Rights, *supra* note 149.

158. *See* HUMAN RIGHTS WATCH, *supra* note 6, at IV, Findings (observing that when aliens cannot be deported, generally it is because they are stateless or their government refuses to accept them).

159. *See id. But see* Zadvydas v. Underdown, 185 F.3d 279, 285 n.4 (1999) (citing Gisbert v. U.S. Attorney General, 988 F.2d 1437, 1448 (5th Cir. 1993) (rejecting the notion that indefinite detention is arbitrary)). Although *Gisbert* ruled on the fate of an excludable, rather than a removable alien, the Court in *Zadvydas* concluded that because it was not aware of any distinctions in international law between removable and excludable aliens, *Gisbert* was controlling. *See Zadvydas*, 185 F.3d at 285 ("We are unaware of any presently relevant distinction in international law between excludable and resident aliens, so for the purpose of adjudicating the application of international law *Gisbert* is directly controlling.").

160. *See* Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 117-18 (1804) (discussing the construction of the Non-intercourse Act of February 27, 1800, 2 Stat. 7, in light of customary international standards on diplomatic protection).

161. *See* Ma v. Reno, 208 F.3d 815, 829-30 (9th Cir. 2000), *cert. granted*, 121 S. Ct. 297 (2000) (recognizing that "we generally construe Congressional legislation to avoid violating international law"); *see also* Fitzpatrick, *supra* note 145, at 604-05 (referencing Justice Harlan's majority opinion in *Chew Heong v. United States*, 112 U.S. 536 (1884) for the proposition that judicial interpretation of statutes avoiding violations of international law, rather than adoption of otherwise violative literal meanings, is grounded in the judiciary's "proper respect" to the executive as a coordinate branch of government charged with immigration policymaking). Another reason courts avoid construing legislation in a way that violates international law is discussed in *Chew Heong*. This case suggests that in the process of legislating, when Congress fails to pay careful attention to international obligations, this implies a lack of "intelligence and patriotism" and reflects badly not only on Congress but on the American people as a whole. *See* Fitzpatrick, *supra*, note 145 at 604-05. In *Chew Heong*, Justice Harlan found that the court has a responsibility, to be both activist and deferential, and must take care to construe statutes as being consistent with international law even if there is another plausible interpretation. *See Chew Heong*, 112 U.S. at 540. Harlan finds that while courts may occasionally intrude on the policy-making powers of immigration authorities, they must take care to remain appropriately deferential and maintain "proper respect" for coordinate branches of government. *See id.*

162. *Ma*, 208 F.3d at 830 (citing United States v. Thomas, 893 F.2d 1066, 1069

Because it is well-established that prolonged and arbitrary detention is contrary to international law, it is appropriate to construe 8 U.S.C. 1231(A)(6) in such a way that does not authorize indefinite detention.[163]

The court in *Ma* acknowledged that when a statute is constitutional, and has been enacted properly, it displaces international law, even if that statute violates international law.[164] However, statutes authorizing indefinite detention of removable aliens are inherently unconstitutional because they deny aliens their freedom beyond the completion of the regulatory process of removal. This denial is an evisceration of the core liberty guarantees protected by the Due Process Clause. Consequently, this unconstitutional policy cannot negate international law, and the Fifth and Tenth Circuit's interpretation of 8 U.S.C. § 1231(A)(6), authorizing indefinite imprisonment, should be superceded by the internationally recognized prohibition against indefinite and arbitrary detention.[165]

(9th Cir. 1990) (discussing the extraterritorial application of a law governing child pornography, noting that although Congress is not bound by international law in enacting statutes, out of respect for other nations courts should refrain from interpreting a statute in a way that violates international law)).

163. *See id.* at 830 (reasoning that the indefinite detention of petitioner "might violate international law" and that avoiding an interpretation inconsistent with international law "renders [the statute] consistent with the *Charming Betsy* rule"). For more on the international community's attempt to promote human rights in domestic law, see the U.N. CHARTER. This treaty was ratified by the United States, and specifically called upon the United Nations to promote the protection of human rights and for member nations to take "joint and separate action to achieve that goal."

164. *Ma*, 208 F.3d at 830 n.28 (citing Alvarez-Mendez v. Stock, 941 F.2d 956, 963 (9th Cir. 1991) (observing that when domestic and international laws conflict, a properly enacted domestic law will displace the international law provided the domestic law is constitutional); RESTATEMENT (THIRD) OF INTERNATIONAL LAW § 115(1)(a). The Restatement provides,

> An act of Congress supercedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supercede the earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled.

Id.

Aside from the constitutional question, the court in *Ma* was reasonable in assuming that while Congress could enact a statute that overrides international law, it is unlikely that they would when, the statute and the international law can be reasonably reconciled. *See Ma*, 208 F.3d at 830.

165. *See* Lance Pace, *Barrera-Echavarra v. Rison: The Court Once Again Sees the Fiction and Ignores the Truth*, 19 HOUS. J. INT'L L. 533, 550-51 (1997) (discussing the application of international law in the *Barrera-Echavarra* case, and concluding that international law prohibiting arbitrary detention trumps domestic laws authorizing indefinite detention, because these domestic laws are "abhorrent to our constitution"); *see also* Weisselberg, *supra* note 47, at 1009 (discussing how human rights norms provide a way to measure our own nation's conduct and determine whether we meet the baseline standards required of all nations). Weisselberg notes that our immigration practices would better conform with human rights norms if all

CONCLUSION AND RECOMMENDATIONS

Many INS detainees are held indefinitely by the INS because they are stateless or are nationals of a country with limited or no diplomatic relations with the United States.[166] Their liberty often has been subject to the Attorney General's seemingly limitless discretion.[167] The circuit courts are split on the amount of deference due to Congress and the Attorney General, and how heavily to weigh the rights of the alien in question.[168]

This split has resulted in removable aliens being afforded different levels of due process depending on where they are detained pending deportation. To resolve this dilemma and to bring U.S. policy in line with international norms and standards, Congress should pass legislation requiring the INS to create federal regulations establishing reasonable time limits on detention for immigrants whose deportation cannot be secured once it is final.

In addition, to ensure that aliens are treated fairly and consistently in the deportation process, the Supreme Court should confirm that removable aliens within the United States are entitled to constitutional due process protections and may not be arbitrarily detained.

people, within U.S. territory, standing at the border or detained abroad by our government, were considered persons within the Due Process Clause and were provided with fair judicial proceedings. *See id.* *But see* Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1363 (1999) (arguing that while international human rights norms are relevant to some key immigration issues, they cannot provide answers to questions where "distinctively American notions of community and immigration" are at play). Motomura finds that the international human rights perspective focuses on safeguarding non-citizens' interests and rights, but fails to analyze how their interests and rights are intertwined with the interests of citizens. *See id.*

166. *See supra* Part II.A.

167. *See* Gorman, *supra* note 113 (commenting on the statutory history of the indefinite detention of deportable aliens).

168. *See supra* Parts II and III.